Foraging Through the Jungle of Expert Discovery and Testimony

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Managing and maneuvering around testifying and consulting experts can be a real challenge, especially in complex environmental litigation cases where there are vast amounts of data. I find myself constantly looking ahead to see whether a consulting expert will change to a testifying expert and vice versa. As a result, I am very cautious about the nature of communications with these experts while I ensure that these experts are given all documents necessary to form their opinions. This juggling act reminds me of the final scene in *The Fly* (the version with Vincent Price, not Jeff Goldblum). The scientist-turned-fly is caught in the spider's web, screaming "Help Me! Help Me!" as the spider approaches. Although case law is still unsettled, this article provides some tips to help you sort through the use of experts, so that you do not get caught up in the web of expert discovery.

Experts are an essential component to environmental litigation. Experts collect data to help prove or disprove information, such as the source of a contamination, the extent of contamination, the cost of remedial action, and property valuation. The experts may collect data about air, soil, groundwater, surface water, and geological gradient or interpret other experts' data. The use of all this data generates reports, opinions, and an array of potentially discoverable evidence—good or bad.

The basis of expert discovery lies within the rules of civil procedure. Federal Rule of Civil Procedure 26(b)(4) provides for "separate methods of discovery for those experts expected to testify at trial [testifying experts] and those not expected to testify [consulting experts]." *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1141 (5th Cir. 1980). Specifically, the foundation of the difference between a testifying expert and a nontestifying expert is derived from the comparison of subpart (A) and subpart (B) of Rule 26(b)(4). In short, subpart (A) discusses the disclosure of and deposition of experts whose opinions may be presented at trial. Subpart (B) restricts discovery of experts retained in anticipation of litigation or preparation for trial and who are not expected to be called as witnesses at trial.

The use and discovery of testifying experts is fairly straightforward, although there have been some recent hiccups. Under the Rules, a party is required to disclose the identity of any witness who may be used at trial, and such disclosure shall include a written report. Fed. R. Civ. P. 26(a)(2). In addition to submitting a written report, the party must produce materials that the expert "considered" in forming the opinions, regardless of when those materials were received, generated, reviewed, and/or used.

Courts have interpreted Rule 26(a)(2) very broadly and thereby have generated three major issues, the first of which is the production of drafts. Experienced experts typically destroy or overwrite drafts as a normal course of business. But a few courts have required drafts to be produced, even if it was not the expert's normal practice to retain such drafts. *See* Garth T. Yearick, *Lawyers Address Destruction of Testifying Expert's Draft Reports*, LITIGATION NEWS, Jan. 2003. In order to avoid defending a motion to compel the production of drafts that may have been overwritten electronically and are, therefore, impossible to produce, counsel may wish to reach an agreement with opposing counsel early in the litigation that draft expert reports are not discoverable. Opposing counsel probably has the same concerns with its experts, so such an agreement may be possible.

The second issue arising out of testifying expert discovery is the scope of producing documents "considered" by the witness. These documents have been held to include documents or materials "generate[d], review[ed], reflect[ed] upon, read and/or use[d] in connection with the formulation of the opinion, even if such information is ultimately rejected." *Estate of Manship v. United States*, 236 F.R.D. 291, 295 (M.D. La. 2006) (citing Advisory Notes to the 1993 Amendments to Fed. R. Civ. P. 26), *vacated in part on other grounds*, 237 F.R.D. 141 (2006). So, even materials reviewed but rejected by a testifying expert may need to be disclosed.

The disclosure of all documents considered by a testifying expert raises a potential logistical problem, especially with complex environmental litigation cases. Say, for example, that the expert needs to review a room of documents relating to a Superfund site made available by the U.S. Environmental Protection Agency in response to a Freedom of Information Act request. Does the attorney produce copies of all of the boxes of documents in the room—most of which are not considered important by the expert? One option would be for the attorney to review the room and pull out documents for the expert. But then the attorney risks the question at the expert's deposition, "How did you decide which documents to review?" and the answer would be, "My attorney chose them for me."

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In the alternative, to ensure compliance the attorney can index the entire room, but that can be burdensome. Also the attorney may want to notify opposing counsel that the expert will be reviewing documents and invite the opposing counsel or his expert to view the documents also in lieu of providing an index or copies of all of the documents. This way, the other side has the opportunity to review the documents reviewed by your expert, and the intent of the Rule arguably has been met without the burden of ensuring that every document is copied or indexed. In certain large environmental cases with document rooms, this approach may be the most practical way to comply with the Rules. Keep in mind that Rule 26 requires the party seeking discovery to pay the expert "a reasonable fee for time spent in responding to discovery." Fed. R. Civ. P. 26(b)(4)(B). Therefore, if the other side wants copies of everything reviewed by the expert—whether it is two boxes or five hundred boxes—they need to be willing to pay for the reproduction costs and the expert's time to assemble the material. When faced with those potential huge expenses, opposing counsel may be more amenable to entering into an agreement where his expert has the opportunity review the same documents as the other side's expert.

The third issue with testifying experts is the potential disclosure of privileged information. Litigators are familiar with this rule and realize that communications between the attorney and the testifying expert are discoverable under Rule 26(a)(2). Therefore, communications, especially written communications between the attorney and the expert, must be very limited. But what about privileged documents inadvertently produced to a testifying expert? More and more courts are holding that inadvertently produced privileged documents are discoverable.

The 1993 Advisory Committee Notes on Rule 26(a)(2)(B) discuss the lack of protection of privileged materials:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinion. Given this obligation of disclosure, litigators should no longer be able to argue that materials furnished to their experts to be used in forming their opinions, whether or not ultimately relied upon by the expert, are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Although this note clearly states that privileged material given to an expert is not protected, Rule 26(b)(5)(B) provides a "snap-back" provision when privileged documents are inadvertently produced: the privilege is not waived if (1) the disclosure is inadvertent, (2) the holder of the privilege took reasonable steps to prevent disclosure, and (3) the holder took reasonable and prompt steps to rectify the error. *Cf.* Tex. R. Civ. P. 193.3(d) (similar "snap-back" provision under Texas law). This "snap-back" provision has also been approved by the Advisory Committee as an amendment to Rule 502 of the Federal Rules of Evidence.

However, recent cases have held that, for inadvertently disclosed privileged documents, the requirements to produce all documents considered by an expert outweigh the snap-back provision. In the recent case *In re Christus Spohn Hospital Kleberg*, 222 S.W.3d 434 (Tex. 2007), the Supreme Court of Texas held that if a privileged document is inadvertently produced to a testifying expert, the privilege is waived if the expert testifies. So either the privilege is waived or the expert is no longer designated as a testifying expert. The court reasoned that the Rule providing for production of materials by a testifying expert does not mention intent or inadvertent disclosure, and, therefore, there is no exception for inadvertent production. *See* Kevin L. Colbert and Lloyd S. Van Oostenrijk, *Disclosure of Privileged Material: Waive Your Expert Goodbye*, 7 EXPERT EVIDENCE REP. 16 (Aug. 20, 2007).

But other courts have protected privileged material provided to a testifying expert—even an intentional production. In *Crowe Countryside Realty Associates Co. v. Novare Engineers Inc.*, 891 A.2d 838 (R.I. 2006), the Rhode Island Supreme Court held that "core" attorney work product (i.e., an attorney's own conclusions and theories) was protected from discovery even when shared with a testifying expert. Like the Supreme Court of Texas, the court here balanced the need to protect attorney work product with the requirement to produce documents reviewed by the testifying expert. While the Rhode Island court came out on the other side of the balance, the distinguishing factor is that Rhode Island still uses the 1970 version of Rule 26, whereas Texas uses the more recent version. In the 1970 version, a party could discover "facts known and opinions held" by an expert, and the rule did not include "information considered" by the expert, which was added in the 1993 amendments. Therefore, you should review the specific language of the applicable state discovery rule to determine whether the "information considered" language is present.

Even federal courts, however, are split on whether core work product provided to a testifying expert should be produced. *See Wilson v. Wilkinson*, No. 2:04-CV-918, 2006 U.S. Dist. LEXIS 32113, at *10–17 (S.D. Ohio May 19, 2006) (noting the disagreement among federal courts). Smart attorneys thus are extra careful regarding not just what communications are given to the testifying expert, but also what documents.

Consulting experts are a somewhat different beast. The consulting expert privilege is recognized by federal courts and a significant number of state courts. As mentioned, communications with and documents prepared by the consulting expert are prepared in anticipation of litigation. Accordingly, these documents are privileged absent a showing of "exceptional circumstances" by the opposing party. Courts have found "exceptional circumstances" if the object at issue is unavailable after the consulting expert saw it and before the other side's expert saw it or if no other experts are available in that field. *Pearman Indus. v. St. Paul Fire & Marine Ins. Co.*, 128 F. Supp. 2d 1148, 1151 (N.D. Ill. 2001).

A consulting expert serves as a devil's advocate to your case. He can offer candid, privileged opinions to the attorney. Their communications can include a critique of the other side's expert as well as the attorney's fact and testifying

experts. The consulting expert provides an invaluable service to the attorney by providing a forum for frank and open case analysis. Were the samples collected in the best location? Were the samples collected properly? Were the groundwater modeling parameters interpreted correctly? Did the laboratory follow proper quality-assurance/quality-control procedures?

The use of a consulting expert in environmental litigation presents a few challenges. For example, suppose that the attorney wants the consulting expert to collect samples on the allegedly impacted property. It is generally agreed that facts are not privileged, but underlying notes and interpretation of the data are. *See Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981). The process of obtaining such samples may present a challenge. Typically, the defense attorney submits a request to opposing counsel to gain access to the property. Opposing counsel likely will seek the name of the expert, the type of samples collected, and the sample locations. The justification for obtaining such information would be that he needs to ensure that the consultant has adequate insurance and that the sample locations did not harm or interfere with the use of the property. The need to protect privileged information, including the identity of the expert, is weighed against the need to protect property. In addition, opposing counsel likely will want to shadow the consultant and collect samples. It is unlikely that a court would prohibit a party from shadowing the consultant. Arguably, the need for this information would qualify as an "exceptional circumstance." In a case involving property contamination, it is possible that soil and/or groundwater conditions have changed since a consulting expert collected samples. So if site conditions at a particular point in time become a critical issue and the consulting expert was the only one collecting data, a court likely would require the discovery of that information.

Using a consulting expert to collect samples raises another concern. If the expert collects data, does that expert become a fact witness subject to deposition and related discovery? A consulting expert who acquires firsthand knowledge of the facts may become a fact witness who is subject to discovery. It is one thing for a consulting expert to review the property as a crash expert would review wreckage from a plane crash; but it may be a different situation when a consulting expert collects samples and thereby creates new data. If the data becomes a key issue in the case, the expert's testimony likely will be needed to prove the results. And depending on whether the results are helpful or damaging, this could present a real dilemma for the attorney. Thus, in practice I recommend using consulting experts to analyze existing data and to recommend, but not collect, additional samples.

Although it is generally understood that facts are not privileged, the issue of producing laboratory results is not well settled. For example, a criminal case out of North Carolina found that a lab report, the lab's analytical procedures, and the results of its test were not discoverable because the defendant did not intend to introduce them at trial. *State v. Dunn*, 571 S.E.2d 650 (N.C. Ct. App. 2002). Although the state statute regarding disclosure of expert reports is not identical to Rule 26, the same basic intent was there. *See* N.C. GEN. STAT. § 15A-905(b). The statute required disclosure of reports and data in the possession and control of the testifying expert. Because the data at issue belonged to a nontestifying expert, they were protected. In short, not every jurisdiction treats data as nonprivileged information. Here, both the data and the lab technician were found to fall under the work product privilege.

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Another issue that has arisen concerns the use of a consulting expert's opinions to help prepare a testifying expert. I have not personally done this, but it is possible that an attorney would obtain novel theories from the consulting expert and use those theories to help prepare the testifying expert. These theories then become "information considered" by the testifying expert in forming his opinions. Substantial interactions between the testifying expert and consulting expert also have been considered "exceptional circumstances" by courts. *See Herman v. Marine Midland Bank*, 207 F.R.D. 26 (W.D.N.Y. 2002).

Therefore, as a practical matter the attorney should be careful about discussing comments received from the consulting expert with the testifying expert. In order to protect information from a consulting expert, keep in mind these basic principals: (1) Ensure that the consulting expert was retained in anticipation of litigation (spell it out in the engagement letter); (2) Ensure that the consulting expert has no firsthand knowledge of the facts. As mentioned above, you may not want your consulting expert to collect samples because he may become a fact witness; and (3) Ensure that the consulting expert does not provide opinions to a testifying expert to consider.

What about the client's consultant? Often the client has already hired a consultant or used an in-house resource that has collected data and generated reports. If these reports were prepared as part of a regulatory investigation, these documents likely are not privileged. But if they were prepared in anticipation of litigation and the documents were not disclosed to a third party, one may be able to argue that they are privileged.

Often counsel is brought into a situation after data has been collected. That counsel then retains the consultant "in anticipation of litigation" and tries to protect the consultant's documents as work product. Given, however, that the consul-

tant already has become a fact witness by virtue of collecting data before being retained by counsel, it is important to clearly delineate the change in the expert's role from fact collector to consultant assisting the attorneys. The situation is analogous to using an in-house employee to investigate an accident. The consultant was initially retained by the client to conduct an investigation of the property and possibly to prepare reports to send to the state regulatory agency. Once the expert is retained by counsel "in anticipation of litigation," is the expert's work product privileged? The key issue that courts consider is whether the expert, in-house or outside, was retained in anticipation of litigation. *See In re Shell Oil Refinery*, 134 F.R.D. 148, 149–50 (E.D. La. 1990). In *Shell*, the court held that employees used to investigate a plant explosion were protected from discovery as consulting experts because their investigation was done in anticipation of litigation. The court went on, however, to hold that those employees could be deposed about their routine operations at the plant. So using in-house employees as experts does not provide any ultimate protection from discovery. Only the information gained by the employee in anticipation of litigation would be protected. This same approach applies to outside consultants that started as fact witnesses and then were retained to assist in the litigation.

This means that although you would like to keep all information about a consulting expert privileged, you should be prepared to disclose the expert's identity and keep in mind that data collected by this expert likely will not be protected. The consulting expert does not have a bulletproof shield, so do not expect to have free rein with what you can do with that expert. Unfortunately, data collected will be fair game. Therefore, it is advisable to accept that facts are facts and that there is little chance of collecting data that will not be discoverable.

I believe that the major benefit of using a consulting expert is to get a fresh set of eyes to review the case and to have a privileged sounding board to assess the case's strengths and weaknesses. Consider entering into an agreement with opposing counsel early in the litigation to address such issues as draft expert reports, data collected by the consulting expert, and identity of consulting experts. Again, the other side usually has the same concerns, so you may be able to reach an agreement on these matters.

The key to dealing with your communications with experts is to look at the big picture and ponder the future: Is it possible that this person will be a testifying expert? If so, be careful about communications, and, if possible, limit your communications with experts to verbal communications so there is no written record. Be careful about discussing case strategy and theories with testifying experts. Let them form their own preliminary, nonwritten opinions, and then challenge these opinions in an almost cross-examination style.

Do not get caught in the legal web of expert discovery. Set out in the engagement letter a consulting expert's role as a consultant, and label all communications as work product prepared in anticipation of litigation. Then be very careful about what is communicated to and reviewed by your testifying expert. Above all, remember that opposing counsel is probably pondering these same issues, so try to reach an agreement on these issues early in the litigation process.